Review of Victoria’s Adult Parole Framework

To: Sentencing Advisory Council

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Queries regarding this submission should be directed to:
Contact persons Brigid Foster
Ph (03) 9607 9374
Email bfoster@liv.asn.au
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Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to provide the Sentencing Advisory Council with a submission on the review of the Adult Parole System in Victoria.

The LIV is very supportive of the parole system. The vast majority of prisoners ultimately leave prison and return to the community. The parole system allows supervision, treatment and assisted reintegration of prisoners back into the community, and the empirical evidence shows that parole reduces recidivism rates and delays the onset of reoffending\(^1\), thus benefitting the community.

The parole system has other significant benefits. Parole reduces the prison population by allowing for the controlled and supervised release of prisoners back into the community, thereby saving the community a significant cost\(^2\). Parole also aids in the management and control of prisoners by offering an incentive for good behaviour, aids in the rehabilitation of offenders through providing support and assistance upon release, and protects the public through supervision of a prisoner on parole\(^3\).

The LIV is sympathetic to the matters set out in the Regulatory Impact Statement (RIS) on the Proposed Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009\(^4\), and the comments of Justice Simon Whelan, Chair of the Adult Parole Board (APB), given in evidence at the Scrutiny of Acts and Regulations Committee (SARC) hearing on the Review of the Charter of Human Rights and Responsibilities Act 2006\(^5\) (the Charter). In particular, the LIV is conscious that it is the interpretation of Justice Whelan that more parole is granted in Victoria than other comparable jurisdictions because Victoria operates a “case management” or “administrative” type approach to parole, instead of a judicial type approach. This system, in the absence of a necessity to comply with the rules of natural justice\(^6\), is flexible and capable of responding to situations very quickly.

Justice Whelan’s appraisal of the benefits of the “case management” system are summed up thus:

“The reason that we think a more court-based system tends to grant less parole is basically because of this cancellation issue. Your appetite for risk with a particular parolee is very much dependent upon what you can do about it if something goes wrong. If you can cancel the person without too much worry, you will be more likely to take a risk with someone. If cancellation is going to result in a court case and might be delayed, or you might be inhibited in your ability to cancel, you might be less willing to take the risk in the first place”\(^7\)

However, while the LIV is anxious to ensure that as many prisoners as possible are afforded the benefits of parole, we submit that the cost of those numbers should not be the lack of natural justice afforded to prisoners. Indeed, procedural fairness needs to be balanced against the efficiency of the system, and the LIV submits that the balance should fall in favour of procedural fairness. In other words, the cost of administration of the parole system, should not be at the cost of justice.

The LIV submits that requiring decisions to be made in accordance with natural justice need not result in the loss of the positive features of the current parole system, especially in relation to flexibility. The context of the obligation for natural justice depends on the context and circumstances of each matter. Natural justice will reflect the positive structure of the current system by ensuring that the process if fair, transparent and understood by prisoners and the community.

\(^2\) The total net operating expenditure and capital cost of housing an individual prisoner, per day in 2009-10 was $293.9351, or $107,284.45 per year: Productivity Commission Report on Government Services 2011, Table 8A.35.
\(^5\) Melbourne, 22 July 2011
\(^6\) s69(2) Corrections Act 1986
Furthermore, the LIV submits that the lack of necessary compliance with the rules of natural justice means that the APB is more likely to make decisions in good faith based on incorrect information, leading to unjust results. Further, any negative decisions may reduce the integrity and confidence in the system, from the perspectives of prisoners and the community. This was recognised by Judd J in Kotzmann v Adult Parole Board of Victoria [2008] VSC 356:

“A decision to revoke a parole order might be validly made on the basis of incorrect information provided to the Board privately, without notice to the person affected and without any opportunity given to the prisoner to be heard in relation to it… If the power under s77(7A) Corrections Act is to be exercised properly the Board ought to be required to satisfy itself of the correctness of the information taken into account. That opportunity is significantly diminished if natural justice is denied a prisoner whose parole order is revoked.”

The LIV therefore submits that s69(2) Corrections Act 1986 should be repealed, and the APB should be bound by the rules of natural justice. Further, the LIV submits that the development of carefully drafted statutory criteria to guide the APB in its decision-making, will ameliorate the concerns set out by Justice Whelan in his evidence to the SARC, and instead provide a valuable framework leading to better decision making, decisions that are accepted and respected more by prisoners and the community, and a transparent process that is more resistant to political and media influence.

Statutory criteria - Guiding principles

Natural justice is a flexible concept, and the basic tenets of natural justice – unbiased adjudication, knowledge of the case against you, the provision of the reasons for an adverse decision, and the right to a review of a decision, can be adapted and tailored to the circumstances of the individual case.

The LIV supports the development of statutory criteria for the granting or cancellation of parole that provide as much flexibility to the APB as possible, while satisfying the requirements of natural justice, and promoting the purposes of parole, namely the reduction in recidivism and the promotion of community safety.

Such an approach would also reflect the view of the High Court in Bugmy v The Queen (1990) 169 CLR 525, that the parole system is of benefit to the community as well as the offender.

The LIV notes that in the UK, where the Parole Board is required to consider primarily the “risk to the public of a further offence being committed…and whether any such risk is acceptable” there has been a dramatic reduction in the proportion of offenders granted parole, and an increase in the refusal of parole to offenders who are not likely to reoffend. Further, a Home Office Research Study in the UK on the emphasis of risk in parole decisions found that “too great a restriction on parole may foster negative attitudes and undermine efforts made in prison to encourage prisoners to change their patterns of criminal behaviour.

The LIV therefore prefers the Canadian approach to parole decision-making. The protection of society is the paramount consideration in any case, but this requires a consideration of the “undue risk” to society, balanced against the value to society of the reintegaration of the offender, with the

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8 Para 45 8 Naylor, B & Schmidt, J “Do Prisoners have a Right to Fairness before the Parole Board?” Sydney Law Review [Vol 32:437 2010] p452
9 Kioa v West (1985) 159 CLR 550, 585.
10 Bugmy v The Queen (1990) 169 CLR 525, 530-1.
12 Parole Board (UK), Directions to the Parole Board under Section 32(6) Criminal Justice Act 1991 (UK) – Issued May 2004 (May 2004)
15 Corrections and Conditional Release Act, SC 1992, c20, s101(a)
16 Corrections and Conditional Release Act, SC 1992, c20, s102(a)
17 Corrections and Conditional Release Act, SC 1992, c20, s102(b)
The LIV submits that Victoria should adopt a set of statutory guiding principles, similar to those set out in the Canadian Corrections and Conditional Release Act, SC 1992. Such guiding principles would allow the APB the flexibility to make a decision, balancing the risk of reoffending against the benefit to the community of granting parole.

**Statutory criteria – Matters for APB to consider**

The LIV submits that, in order to facilitate the best and most flexible decision-making, the APB should be able to examine as much material as possible when making a decision whether to grant or cancel parole. These factors would include:

- Prior criminal history
- Previous history of supervision in the community
- Nature and circumstances of the offence or offences
- Conduct of the offender while in custody including whether any positive drug tests have been recorded
- Willingness to participate in relevant programs and courses while in custody
- Comments made by the sentencing court
- Assessments and recommendations by appropriate professionals
- Submissions made by the offender and the offender's family
- Written submissions made by the victim or victim's family
- Release plans and whether suitable accommodation is available
- Risk of reoffending after the sentence expires if the prisoner is not released without the support of parole
- Risk of reoffending while on parole
- Assessment of potential risk to the community by a professional trained in risk assessment

To provide as much flexibility as possible, the LIV submits that the list of criteria should be clearly set out in statute, constituting an inclusive list of factors, and also contain the final statutory proviso “and any other matters that the Board considers relevant”.

**Prisoner access to information upon which the APB will rely**

It is a central tenet of procedural fairness that a person should know what information a decision maker will rely upon in order to make a decision, and be provided with an opportunity to address any inaccuracies or clarify any inconsistencies in that information.

This is especially important for decisions relating to parole, which affect a person's liberty.

The LIV notes that in the ACT, UK, NZ and Canada, prisoners are provided with all information considered by the parole board, subject to confidentiality requirements or the protection of information relating to victims.

The LIV prefers the approach undertaken in the ACT, where the board makes an initial determination based on the paperwork before it. If the board is not satisfied on the basis of that paperwork that parole should be granted, then the board must hold a hearing. This approach lessens the administrative burden on the board, as hearings are only held where an adverse decision is likely to be made.

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18 *Corrections and Conditional Release Act, SC 1992, c20, s101(d)*
19 The assessment of risk of reoffending is an imprecise science. The professional undertaking the risk assessment must be expert in the use of the LSI-R or similar risk assessment tools.
In the event that a hearing will be held, the board would then be required to provide the prisoner with notice of the hearing, and this notice would be accompanied by a copy of all the material upon which the board made its initial decision\(^{20}\), subject to certain confidentiality requirements\(^{21}\).

The LIV submits that while there should be an overall statutory presumption of disclosure of all relevant information to a prisoner, that disclosure should be curtailed in certain limited circumstances, defined in statute.

Similar to the ACT position, the LIV submits that documents must not be provided to a prisoner where the document:

- Contains a victim’s home or business address;
- Contains any email address for the victim;
- Contains any contact phone or fax number for the victim;
- Could adversely affect the security or good order and discipline of a correctional facility;
- Could jeopardise the conduct of a lawful investigation;
- Could endanger the prisoner or anyone else; or
- Could otherwise prejudice the public interest\(^{22}\).

If a document is not provided to a prisoner for any of the reasons above, the LIV submits that the UK position should be adopted, namely that:

- An analysis should be undertaken as to whether the information withheld is relevant to the decision in question\(^{23}\);
- If it is relevant, a consideration should be made as to whether information can be summarised in such a way that sensitive information is not disclosed but the gist of the information is disclosed. This may be in the form of a letter, separate document or even made verbally at the hearing\(^{24}\);
- Where it is decided that a document meets the criteria for non-disclosure, each page must be clearly marked “NOT FOR DISCLOSURE” when the document is included in the information provided to the prisoner. The prisoner must also be told in writing that information has been withheld, and under which part(s) of the criteria above\(^{25}\);
- If it is decided that the information is to be withheld from the prisoner because it meets the criteria for non-disclosure, but only part of the document merits withholding, consideration must be given to whether the document could be re-written to exclude the section that is not for disclosure, and so allow the remainder of the document to be disclosed\(^{26}\);
- There may be occasions where information is considered to be so sensitive (e.g. a sensitive police report) that no part of it can be disclosed to the prisoner, under the criteria set out above. In such cases the prisoner must be advised. His or her representative (recognised barrister or solicitor) may apply to have sight of the information. Permission would normally be given only after having first received a written undertaking that they will not disclose the information, in full or in part, to the prisoner\(^{27}\).

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\(^{20}\) Crimes (Sentence Administration) Act 2005 (ACT) s127(3)(b)

\(^{21}\) Crimes (Sentence Administration) Act 2005 (ACT) s192

\(^{22}\) Crimes (Sentence Administration) Act 2005 (ACT) s192

\(^{23}\) PSO 6000 ch 5, 5.16.3(a)

\(^{24}\) PSO 6000 ch 5, 5.16.3(b)

\(^{25}\) PSO 6000 ch 5, 5.16.4

\(^{26}\) PSO 6000 ch 5, 5.16.5

\(^{27}\) PSO 6000 ch 5, 5.16.10
Right to representation at parole hearings

While the right to legal representation is not assured by the common law principles of natural justice, the LIV submits that there is a natural power imbalance at parole board hearings, which can best be addressed by ensuring the prisoner has at least a right to apply to the board to be represented by a legal professional.

Legal representation is especially important considering that the rates of mental disorders are disproportionately high in the offender population within the criminal justice system\(^{28}\).

Other jurisdictions with similar parole systems allow legal representation during parole hearings, although in some jurisdictions that representation is only allowed upon the leave of the board\(^{29}\).

The LIV accepts that an over-riding right to legal representation for all prisoners at parole hearings would impose a significant cost on the criminal justice system; legal aid funding would have to be allocated for those legal appearances.

Upon balance, the LIV prefers the NZ system, which encourages prisoners to speak for themselves in a free and frank manner\(^{30}\). However, while we submit that legal representation should be a matter for the board, there should be a presumption of legal representation where an offender suffers from a mental impairment, is young, or it is appropriate for any other reason. An example of this may be found under the Health Practitioner National Law\(^{31}\) which allows a person to be accompanied by another person, including a lawyer. However, the lawyer may only make submissions on behalf of their client with leave from the Panel.

Any prisoner should be able to make an application to the board to be legally represented at a hearing.

Either the prisoner or his or her legal representation should be able to make submissions to the APB, and address the APB on the accuracy of the information upon which the board will make its decision.

Cancellation of Parole

Where the board is considering cancellation of parole, the LIV submits that for practical reasons, and to allow for speedy and effective cancellation, the prisoner should be afforded natural justice after the fact. That is, after the prisoner has been taken back into custody, they should as soon as practicable be provided with reasons as to the board’s decision to cancel their parole. Thereafter, the prisoner should be allowed a hearing before the board. In this way, the APB’s ability to cancel parole is not unduly fettered.

This approach is not without precedent. The provisions of the Migration Act 1958 which deal with the cancellation of visas outside of Australia\(^{32}\) first state that the relevant Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with\(^{33}\). This curtails a person’s right to rely upon the common law principles of natural justice, allowing for natural justice to be afforded after the fact; in this case, after the cancellation of parole.

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29 Parole Act 2002 (NZ) s49(3)
30 Parole Act 2002 (NZ) s49(1)
31 Health Practitioner Regulation National Law Act 2009 (Vic) (Qld) s186
32 Subdivision F, sections 127A – 133 Migration Act 1958
33 s127A(1) Migration Act 1958
The *Migration Act* provisions then allow for a Minister to cancel a person’s visa *without notice* in certain circumstances\(^{34}\).

Thereafter, the Minister is required to provide the former holder of a visa with a notice stating the grounds for cancellation, the particulars of that ground and the information upon which the ground was considered to exist.

The LIV submits that a similar statutory statement would provide the APB with the utmost flexibility in terms of cancelling parole, whilst also satisfying the principles of natural justice.

**Access to reasons**

To comply with the rules of natural justice, the LIV submits that the *Corrections Act 1986* should be amended to require the APB to provide a prisoner with written reasons in the event of an adverse decision, that is, a decision either refusing or cancelling parole. Those written decisions need not be unduly lengthy or onerous for the APB to comply with, but should clearly state upon what grounds the APB has made its decision. As there is no common law right to reasons as part of natural justice, the justification for reasons includes transparency, improving a prisoner’s understanding of the decision; and improving the quality of decisions by the Board to consciously identify and consider its reasons.

The LIV notes that in NZ, detailed “decisions of public interest” of the parole board are posted on the parole board’s website\(^{35}\). The LIV submits that a similar system adopted in Victoria would increase public knowledge and confidence in the parole system.

**Appeal from parole decisions**

Parole decisions ultimately affect a person’s liberty. While there is no “right” to parole, fairness would dictate that decisions in relation to parole should be appealable, by way of a reconsideration of the merits of the board’s decision. The rationale for review is to ensure the integrity of the process by rectifying any errors or unfairness.

The LIV submits the experience in other jurisdictions has shown that an avalanche of appeals does not necessarily follow the move to allowing appeals. In NZ, for example, in 2008-09 only 4.2% of decisions to deny parole were appealed\(^{36}\).

The LIV submits that the *Corrections Act 1986* should be amended to allow a right of appeal for parole decisions. An Appeals Division of the APB should be established by statute. The LIV favours the creation of such an appeals body in recognition of the fact that the APB is a specialist board with special expertise; it would be inappropriate to allow appeals to the Victorian Civil and Administrative Tribunal, for example.

Based on the NZ example (modified), the LIV submits that the following should be statutory grounds for an application for review:

That the Board, in making the decision:

(a) failed to comply with the procedures set out in the *Corrections Act 1986* and any regulations made under it; or

(b) failed to comply with the rules of natural justice, which resulted in unfairness to the offender; or

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\(^{34}\) s128 *Migration Act 1958*


(c) based its decision on erroneous or irrelevant information that was material to the decision reached; or

(d) acted without jurisdiction.

LIV Recommendations

Recommendation 1

The LIV submits that s69(2) Corrections Act 1986 should be repealed, so that the APB is bound by the rules of natural justice.

Recommendation 2

The LIV submits that Victoria should adopt a set of statutory guiding principles, similar to those set out in the Canadian Corrections and Conditional Release Act, SC 1992. Such guiding principles would allow the APB the flexibility to make a decision, balancing the risk of reoffending against the benefit to the community of granting parole.

Recommendation 3

That the Corrections Act 1986 be amended to include an inclusive, non-exhaustive set of statutory criteria that the APB can consider when making a decision whether to grant or cancel parole.

Recommendation 4

The LIV submits that the Corrections Act 1986 should be amended to require the APB to make an initial assessment of the written material as to whether a prisoner should be granted or refused parole. In the event of an adverse decision, a hearing should be held.

Recommendation 5

There should be a statutory presumption in favour of full disclosure to the prisoner of all information upon which the APB will make its decision. That disclosure can be curtailed in limited, statutorily defined cases.